No. 87-438

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CLARA FRATICELLI, et al.,
Petitioners,

v.

THE DOW CHEMICAL COMPANY, et al.,
Respondents.

GERALD HOGAN,
Petitioner,

v.

THE DOW CHEMICAL COMPANY, et al.,
Respondents.

In re "Agent Orange" Product Liability Litigation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

I. Whether this Court should review the Second Circuit's decision affirming the district court's holding that the *"Agent Orange"* class action complaints by and on behalf of Vietnam veterans did not toll the statute of limitations for a group of civilians whose alleged exposure to phenoxy herbicides did not occur in or near Vietnam.

II. Whether this Court should review the Second Circuit's decision affirming the district court's dismissal of Dr. Hogan's complaint under Fed. R. Civ. P. 37(b), where the district court found as a fact that (1) Petitioner's refusal to obey the magistrate's order to continue his deposition was not due to illness, but was "an excuse to prevent being embarrassed by a searching deposition" and (2) Petitioner was aware of the possible consequences of refusing to continue the deposition.

Parties Below

The parties to the proceedings below, as required by Supreme Court Rules 22.1 and 34.1, are the Petitioners, James K. Oshita, Masao Takatsuki, Clara Fraticelli, individually and as the representative of the estate of her husband, William J. Fraticelli, Dr. Gerald Hogan and the Respondents, The Dow Chemical Company, Monsanto Company, Hercules Incorporated, Uniroyal, Inc., T H Agriculture & Nutrition Company, Inc. and the United States of America.*

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* The parent companies, subsidiaries and affiliates of the corporate parties, as required by Supreme Court Rule 28.1, are:

The Dow Chemical Company, Respondent.

Alamo Land Company, Inc.; Arabian Chemical Company; Compagnie des Services Dowell Schlumberger; Chief Shipping Company; DCU/LB TRUST; Cromarty Petroleum

(footnote continued on following page)

(footnote continued from preceding page)

Company Limited; Scotdril Offshore Company; Chimtrade; Vorakim Kimya Sanayi Ve Ticaret A.S.; Transformadora de Etileno S.A.; Dowell Schlumberger Canada Inc.; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech Inc.; MT Partnership; Wabiskaw Explorations LTD; Haeger and Kaessner Limited; Viopol S.A.; Oronzio de Nora Technologies S.p.A.; Dow Corning Corporation; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Insul/Crete Company, Inc.; ISOPOR—Companhia Portuguesa de Isociantos Ltda.; Ivon Watkins-Dow Limited; Joliet Marine Terminal Trust Estate; M.D. Kasei Limited; Funai Pharmaceuticals Company Ltd.; First Chemical Factoring S.p.A.; Laboratories Industriales Farmaceuticos Ecuatorianos (L.I.F.E.); MDP (Holdings) Ltd.; Metal Mark, Inc.; Fort Saskatchewan Ethylene Storage Corporation; Oronzio de Nora Impianti Elettrochimici S.A., Lugano; Oronzio de Nora Technologies B.V.; Oronzio de Nora Technologies S.p.A.; P.T. Pacific Chemicals Indonesia; Pacific Chemicals Berhad; Pacific Plastics (Thailand) Limited; Petroquimica-Dow S.A.; The Cynara Company; Vorakim Kimya Sanayi VE Ticaret A.S.; Zip Pak Incorporated.

Monsanto Company, Respondent.

ACM Services, Inc., Advent Eurofund Limited, Advent-Techno Venture Investment Corp. N.V., Australian Fluorine Chemicals Pty. Limited, Companhia Duasiliera de Dsuirena, Fosbrasil S.A., Hydrocarbon Products Pty. Ltd., K.K. Astro, Invitron Corporation, Korag Company Limited, Kinetek Systems Incorporated, Korsil Company Limited, Limewood Run-Off Limited, Mitsubishi Monsanto Chemical Company, Monsanto Chemicals of India Limited, Monsanto Chemicals (Thailand) Limited, Monsanto (Malaysia) Sendirian Berhad, Nippon Cooper Kabushiki Kaisha, Nippon Fisher Company, Ltd., Nomix Manufacturing Company Limited, NutraSweet AG, Quimica do Triangulo Ltda., Revertex Industries (Aust.) Pty. Limited, Revertex Industries (N.Z.) Ltd., Revinex Australia Limited, Ryowa, K.K., Titan Chemicals Limited, Tsukuba Service Company, Ltd.

Hercules Incorporated, Respondent.

A.C. Hatrick Chemicals Pty. Ltd., A.C. Hatrick, (N.Z.) Ltd., A/S Kobenhavens Pektinfabrik (CPF), A/S Kobenhavens Pektin Fabrik, Abieta Chemie GmbH, AEONIC Systems, Inc., Algas Marinas S.A., Alkyls do Brasil Ltds., Aqualon Company, Austchem Nominees Pty. Ltd., Australian Chemical Holdings Ltd., BHC Laboratories, Inc.,

(footnote continued on following page)

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Caribbean Lumber Co., Centennial Lumber Company, Ceratonia, S.A., Cesalpinia, S.p.A., Champlain Cable Corporation, Compania Brasil Eira De Productos, Curtis Bay Insurance Co. Ltd., Dawood Hercules Chemical Ltd., Devron Hercules Inc., DIC-Hercules Chemicals Inc., EKC Technology, Inc., Electronic Display Systems, Inc., EPICOR Laboratories, Inc., Genu Products Canada Limited, Genu Products Philippines Inc., Hafimij B.V., Hercochem (H.K.) Ltd., Hercofina Europe V.O.F., Hercofina Joint Venture, Hercoform Incorporated, Hercoform Marketing Inc., Hercules Aerospace Espana, S.A., Hercules Andino S.A., Hercules Canada, Inc., Hercules Chemical Corporation, Hercules Chemicals Investments Pty. Ltd., Hercules Chemicals B.V., Hercules Credit Inc., Hercules de Centro America S.A., Hercules Defense Electronic Systems, Inc., Hercules Do Brasil Productos Quimicos Ltd., Hercules Far East Ltd., Hercules Finance Co. Ltd., Hercules France S.A., Hercules GmbH, Hercules (Holdings) Ltd., Hercules Islands Corporation, Hercules Kemiska Aktiebolag, Hercules Ltd., Hercules Overseas Corporation, Hercules Taiwan Co. Ltd., Hercules Trading Corporation, Herdillia Chemicals Ltd., Hersean PTE Ltd., Himont, Belgium, Himont, Canada, Himont Incorporated, Himont, Italia, Himont U.S.A., Inc., Holden Vale Mfg. Co. Ltd., Infinetics, Inc., Inmobilaria Petrocel, Intermarine USA, Mathersa Industries Quimicas, S.A., MICA Corporation, MICA TEK Sales, Inc., MICRON Sales Inc., Moplefan N.V., Moplefan S.p.A., Moplefan (U.K.), Oy Hercofin Ab, NFW (Australia) Pty. Ltd., PFW (Deutschland) B.V. & Co. Aromen, PFW (Leasing) B.V., PFW Ltd., PFW (Nederland) B.V., PPD Hercules, Inc., P.T. Hercules Mas Indonesia, Patex Chemie GmbH, Etichem S.A., Petrocel S.A., Petroleum Fluids, Inc., Polo Industria E. Commercia Ltda., Pomosin AG, Quimica Hercules de Colombia Limited, Quimica Hercules S.A. de C.V., Quimproc, S.A., Rika Hercules Inc., Rohe, S.A. Ross Pulp & Paper, Inc., Semi-Gas Systems, Inc., Simmonds Industries Inc., d/b/a Cooperative Industries Inc., Simmonds Precision AG, Simmonds Precision Engine Systems, Simmonds Precision Ltd., Simmonds Precision Motion Controls, Inc., Simmonds Precision NV, Simmonds Precision Products Inc., St. Croix Petrochemical Corp., Sumika-Hercules Co. Ltd., Taiwan Hercules Chemicals, Inc., Taloquimia, S.A., Teratec Systems Inc., Texas Alkyls Belgium, S.A., Texas Alkyls Inc.

Uniroyal, Inc., Respondent, was dissolved pursuant to the laws of the State of New Jersey.

T H Agriculture & Nutrition Company, Inc., Respondent.

North American Philips Corporation.

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BRIEF IN OPPOSITION

Respondents The Dow Chemical Company, Monsanto Company, Hercules Incorporated, Uniroyal, Inc. and T H Agriculture & Nutrition Company, Inc. respectfully ask this Court to deny the petition for writ of certiorari in this case.

Opinions Below

The opinions below are set forth adequately in the Petition.

Statutes and Rules

Rule 37(b) of the Federal Rules of Civil Procedure provides:

(b) Failure to comply with order.

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Statement of the Case

The Hawaiian Petitioners

This case arises out of an attempt by several Hawaiian civilians, who initially claimed that their case was very dif-

ferent from *Agent Orange*, to avoid dismissal of their claims on statute of limitations grounds by claiming to be part of the *Agent Orange* litigation.

In 1967, James Oshita, Masao Takatsuki and William Fraticelli were employees of the University of Hawaii College of Tropical Agriculture and Human Resources. All three claim to have been exposed to a variety of chemicals tested by the University on behalf of the United States government. In 1979, all three filed workers' compensation claims alleging injuries caused by a host of toxic substances, including arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead, fluorine and phenoxy herbicides. *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1285, 1287 (E.D.N.Y. 1985) (App. 622a).*

Petitioners filed suit in January 1982. The district court granted summary judgment dismissing Petitioners' claims on statute of limitations grounds, reasoning that Petitioners must have known of their injuries prior to bringing their workers' compensation claims in 1979. *Id.* (App. 624a).** Additionally, the district court found that the filing of the *Agent Orange* class action complaints on behalf of veterans did not toll the statute of limitations concerning civilian claims. *Id.* at 1289 (Pet. 627a-28a). Thus, the claims were barred by the two-year Hawaiian statute of limitations.

On appeal, Petitioners argued that the filing of the *Agent Orange* class action complaint should have tolled the statute of limitations. The court of appeals rejected this argument

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* Citations preceded by App. are to the Single Appendix filed by the various Petitioners.

** The district court also granted summary judgment on the ground that Petitioners had provided no evidence of causation. This issue was not discussed by the court of appeals.

because Petitioners were never part of either the proposed or the certified class. *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 210, 214 (2d Cir. 1987) (App. 772a). In concluding that Petitioners were never part of the proposed or the certified class, the court of appeals relied on "a fair reading of the original class action complaints." *Id.* The court also noted that at an earlier stage in the proceedings Petitioners' counsel had argued that Petitioners' suit was "substantially different" and "separate and distinct" from the *Agent Orange* proceedings. *Id.* at 213 (App. 771a-72a).

Dr. Gerald Hogan

Petitioner Gerald Hogan, another of the so-called civilian plaintiffs, seeks a writ to review the factual underpinnings of the dismissal of his complaint pursuant to Fed. R. Civ. P. 37 for his willful failure to obey a discovery order. Gerald Hogan is a medical doctor who worked as a civilian contract physician for the United States Agency for International Development in a hospital in Vietnam in 1966. He spent no more than four months in Vietnam. During the first month he worked in a civilian hospital in the middle of the City of Da Nang. He spent the last three months as a patient in a United States hospital in Da Nang.

Petitioner claims he was exposed to Agent Orange during a single month in Da Nang city as a result of his physical contact with Vietnamese patients (who allegedly had been exposed to Agent Orange) and from inhaling dioxin-laden dust—a claim characterized by the district court as "bizarre." *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1290, 1295 (E.D.N.Y. 1985) (App. 640a). Petitioner was diagnosed in Vietnam as having had an allergic reaction to penicillin or other allergens—an allergy he was known to have had prior to his arrival in Vietnam.

Id. at 1292 (App. 631a-32a); JA 15380-82 ¶¶ 9-15, 15388 ¶ 26.*

Petitioner returned to the United States and resumed his medical practice in cardiovascular surgery in 1967. He left that position in 1971 because of declining health. Petitioner claims that his alleged exposure to Agent Orange has resulted at various times since 1975 in a dozen diseases including immune deficiency, vasculitis and hemi-Parkinson's disease. 611 F. Supp. at 1292 (App. 632a).

In 1981 Petitioner brought this action in Nevada state court. The action was removed on diversity grounds to federal court, transferred to the Eastern District of New York and consolidated with the *Agent Orange* multidistrict litigation. In August 1984, following the settlement of the *Agent Orange* class action, defendants moved in this action for summary judgment asserting, *inter alia,* that Petitioner could not show (1) exposure to Agent Orange, or (2) that Agent Orange caused any of his illnesses.

Thereafter the magistrate ordered a two-day deposition of Petitioner to permit defendants to discover the facts underlying Petitioner's exposure allegations and the myriad diseases he attributes to his alleged exposure. JA 14431 ¶ 10. The deposition was to be taken at Petitioner's Las Vegas residence and to commence on March 21, 1985. After lunch on the first day of the deposition, Petitioner's attorney informed defendants' counsel that Petitioner was unable to continue with the deposition. Petitioner claimed to be suffering from cardiac arrhythmia (an alteration in the rhythm of the heart beat) which he believed was caused by airborne pollutants. JA 14570.

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* Citations preceded by JA are to the Joint Appendix filed in the court of appeals.

The following day Petitioner refused to continue and said he was considering discontinuing the action. However, in a telephone conference with the magistrate on March 27, 1985, Petitioner announced he would continue the suit, but sought an indefinite suspension of his deposition because of ill health. In support of the latter claim, Petitioner submitted an affidavit of a Dallas physician, Dr. William Rea. Based on a telephone call from Petitioner in Las Vegas to Dr. Rea in his Texas office, Dr. Rea concurred in Petitioner's self-diagnosis that Petitioner was suffering from cardiac arrhythmia, fatigue and mental confusion resulting from the stress of the deposition. Dr. Rea concluded that Petitioner should not resume his deposition "until such time as Dr. Hogan and I feel that he is strong enough to withstand further questioning and exposure to an environment contaminated by questioning attorney[s] and other pollutants." JA 14966 ¶ 5.

At defendants' request, the magistrate ordered an independent examination of Petitioner. It was conducted in Las Vegas on April 1, 1985 by Dr. Samuel Spagnolo, the Director of the Division of Pulmonary Disease and Allergy and Professor of Medicine at George Washington University School of Medicine. Dr. Spagnolo found no evidence of cardiac abnormalities, mental confusion or fatigue. He concluded based upon his physical findings, the results of an electrocardiogram and Petitioner's history that Petitioner "would be able to undergo further deposition." JA 14964 ¶ 9; *see* 611 F. Supp. at 1293 (App. 635a).

In an April 2 telephone conference among all parties and the magistrate, Petitioner offered no additional evidence in support of his request for an indefinite suspension of his deposition. The magistrate found Petitioner had failed to sustain his burden, ordered the deposition to resume, but

reduced it to one day's duration. The following day, Petitioner's counsel informed the magistrate that Petitioner refused to comply with the magistrate's order because he felt physically unable to do so. Petitioner's counsel added that Dr. Hogan "understands the consequences of not going forward with the deposition." JA 14935.

Defendants then moved for dismissal of the complaint under Fed. R. Civ. P. 37. In opposing the motion, Petitioner offered no additional medical documentation to indicate he was unable to attend even a one-day deposition. *See* 611 F. Supp. at 1294 (App. 638a). Rather he sought to place his case on a dormant calendar. Doc. 6031 at 7.* At no time during the argument of the motion on April 15, 1985 did Petitioner state his intention to comply with the magistrate's order. 611 F. Supp. at 1293 (App. 636a).

The district court granted defendants' motion to dismiss, concurring with the magistrate's finding that Petitioner's "claim of ill health is untrue" and that he was able to resume the deposition. *Id.* at 1294 (App. 638a). The district court expressly found that Petitioner's illness was merely "an excuse to prevent being embarrassed by a searching deposition" and constituted a "gross form of spoliation" of evidence in light of the patent weaknesses in Petitioner's exposure and causation evidence. *Id.*

With respect to defendants' motion for summary judgment, the district court found that "there is no proof that the diseases and symptoms suffered by [Petitioner] were caused by Agent Orange." *Id.* at 1295 (App. 640a). Accordingly, said the court, "[w]ere the case not dismissed under Rule 37, it would have to be dismissed under Rule 56." *Id.*

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* Citations preceded by Doc. are to materials on record in the district court.

On appeal, the Second Circuit held that the district court's factual findings concerning Petitioner's health and his motivation for refusing to be deposed were not clearly erroneous. *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 210, 212 (2d Cir. 1987) (App. 768a). The court concluded that dismissal was appropriate "[i]n view of the district court's factual findings . . . and [Petitioner's] awareness of the consequences of his refusal to obey the magistrate's order . . . ." *Id.* The court did not address the causation-related grounds of defendants' motion for summary judgment.

Reasons for Denying the Writ

I.

The Hawaiian Petitioners

The writ should be denied because the decision below does not conflict with any decision of this Court or any other court and the only issue presented is whether the district court and the court of appeals correctly interpreted a complaint in this case.

Petitioners' assertion that the court of appeals refused to follow the rule of *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974), is a gross misreading of the court of appeals' opinion. The court of appeals questioned whether the rule of *American Pipe* should apply, but concluded that even if it applied, Petitioners' claims were time-barred. In applying the rule of *American Pipe* the court of appeals stated:

> The intent of the *American Pipe* rule is to preserve the individual right to sue of the members of a proposed class until the issue of class certification has been decided. . . . Its purpose is not to toll the statute of limitations for persons such as these

> Hawaiian plaintiffs who were not members of either the proposed or certified class.

818 F.2d at 214 (App. 772A).*

Petitioners do not disagree with that description of the rule. They merely argue that the court of appeals erred in finding that Petitioners were not members of the proposed *Agent Orange* class. (Pet. 15-16). Thus, the only issue raised by the Petition is whether the district court and the court of appeals correctly interpreted the *Agent Orange* class action complaints.

A disagreement concerning the interpretation of a complaint is not an important enough issue to warrant the granting of a writ of certiorari. This is especially true when, in order to create such an issue, Petitioners distort the record below and rely solely on selected language from a complaint that has no bearing on the scope of the *Agent Orange* class action.

Petitioners' argument is premised upon numerous inaccurate characterizations of the proceedings below. For example, the Petitioners state that Judge Weinstein never considered Petitioners' tolling argument. (Pet. 7). However, Judge Weinstein considered and explicitly rejected Petitioners' tolling argument, stating that the veterans' class action "had no effect in tolling the statute of limitations." 611 F. Supp. at 1289 (App. 627a).

Petitioners contend that Judge Pratt's statement about the possible need to create subclasses indicates that the class complaints could be broad enough to include their

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* Indeed the cases cited by Petitioners argue against tolling in cases such as this. *See, e.g., American Pipe,* 414 U.S. at 555, *Crown, Cork & Seal Co.* v. *Parker,* 462 U.S. 345, 355 (1983) (Powell, J., concurring) (explaining that the tolling effect applies only to cases for which the class action complaint provided fair notice).

claims. That argument can only be made by ignoring Judge Pratt's statement that "there are four groups of plaintiffs—Vietnam veterans, their spouses, their parents and their children." *In re "Agent Orange" Product Liability Litigation,* 506 F. Supp. 762, 769 (E.D.N.Y. 1980) (App. 8a). Moreover, Judge Pratt's discussion of class notice is solely a discussion of how to provide notice to the veterans and their families. *Id.* at 791-92 (App. 57a-59a). In short, Petitioners' argument is based on a distortion of Judge Pratt's decision.

Even the *Skillings* complaint relied on by Petitioners does not support Petitioners' argument. Numerous portions of that complaint make clear that it is made by and on behalf of Vietnam veterans and their families. *See* JA 1210-12 ¶¶ 21-23, 26-27, 1229-30 ¶¶ 92-93, 1236-37 ¶ 110, 1238 ¶ 114, 1335 ¶¶ 563-65. Indeed in explaining why the named class representatives will adequately represent the class, paragraph 27 of the *Skillings* complaint states that they are "representative of an indeterminate number of approximately 4.2 million American servicemen who are at risk from exposure to phenoxy herbicides." Accordingly, even if *Skillings* were relevant, it does not support Petitioners' claims.

A brief review of the history of the *Agent Orange* proceedings establishes that the *Skillings* complaint is not relevant. The *Agent Orange* litigation began in 1978 with the filing of several complaints by Vietnam veterans and their families. Some of these were class action complaints on behalf of named Vietnam veterans and all persons similarly situated. *Skillings* was one of the earlier class action complaints. When the *Agent Orange* actions were transferred to the Eastern District of New York for multidistrict proceedings, the district court designated one of those actions

as the lead class action. All subsequent proceedings, including issues relating to the scope of the *Agent Orange* class, were based on pleadings in the lead action, and the parties and the district court always treated the *Agent Orange* class action as a claim by and on behalf of Vietnam veterans and their families. 818 F.2d at 214 (App. 772a). Thus, even if a dispute concerning the reading of a particular complaint could be grounds for a petition for certiorari, Petitioners' reliance on *Skillings* to raise such an issue is misplaced.

II.

Dr. Gerald Hogan

The Petition raises no special or important issue for review by this Court. *See* Sup. Ct. R. 17. Despite the Petition's claim otherwise, it seeks review only of questions of fact that arise under well-settled rules of this and other courts concerning the dismissal of actions under Rule 37(b). Ordinarily, however, this Court does "not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), and there is no reason for doing so here.

Petitioner contends (Pet. 23) that the Second Circuit's application of Rule 37(b) is "unprecedented" and "conflicts" with the guidelines set out by this Court in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958) and *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). Here, however, both the district court (611 F. Supp. at 1294-95 (App. 636a-39a)) and the court of appeals (818 F.2d at 212 (App. 768a-69a)) acknowledged the teaching of those cases: dismissal of a

complaint under Rule 37(b) for a plaintiff's non-compliance with a pretrial discovery order is not proper where it has been established that the failure to comply "has been due to inability, and not to willfullness, bad faith or any fault of petitioner." *National Hockey*, 427 U.S. at 640 (quoting *Societe Internationale*, 357 U.S. at 212).

Petitioner's real dispute with the lower courts is not with the legal rules they applied, but with their determination of the facts. He contends that in refusing to be deposed his conduct "could not have risen to the level of 'willful-[ness], bad faith or fault'." (Pet. 25). The district court found as a fact, however, that Petitioner's "claim of ill health is untrue and is an excuse to prevent being embarrassed by a searching deposition." 611 F. Supp. at 1294 (App. 638a). Those findings were affirmed by the court of appeals as "not clearly erroneous," 818 F.2d at 212 (App. 768a), and are supported by substantial record evidence.

Petitioner's contention that he expressly stated his desire to continue his deposition at a later date (Pet. 23) and asked only "for six weeks to recuperate" (Pet. 25) is untrue. The district court found that Petitioner had sought an "indefinite suspension" of the deposition, 611 F. Supp. at 1293 (App. 634a); *see* JA 16320-21, and that there was "no indication . . . that [he] intended at any time to comply with the Magistrate's order," 611 F. Supp. at 1293 (App. 636a). Indeed, Petitioner's opposition to defendants' Rule 37 motion included a request that his case be placed on the district court's dormant calendar. Doc. 6031 at 7.

This Court has said that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). No such showing has been or

could be made here. The only questions raised by Petitioner here turn entirely on the facts of this case, have already been twice resolved in Respondents' favor and are without any impact outside the limits of this case. In such circumstances, certiorari should be denied.

CONCLUSION

For each of the reasons stated the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 30, 1987

Respectfully submitted,

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